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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROBERT C. RYAN,

Plaintiff and Respondent,

v.

DAVID G. RONQUILLO et al.,

Defendants and Appellants.

D042351

(Super. Ct. No. GIC782586)

APPEAL from a judgment of the Superior Court of San Diego County, Patricia Y. Cowett, Judge. Affirmed.

David G. Ronquillo and Lionel E. Orderica ("Partners") and Ronquillo & Orderica ("Law Firm") (all collectively referred to as "Defendants") appeal from a judgment awarding their former employee, plaintiff Robert C. Ryan, \$5,632 in damages, \$4,981.46 in costs, and \$94,290 in attorney's fees. For reasons explained in this opinion, we affirm the judgment and award Ryan his costs on appeal.

# I

## PROCEDURAL SUMMARY

Ryan filed this action against the Defendants, seeking back wages, costs and bonuses allegedly due to him under an employment agreement. His first amended complaint was framed in 11 causes of action, based upon "factual" allegations describing a business relationship between the three attorneys that began in 1995 when Ryan allegedly moved from Seattle to San Diego to work on cases handled by Defendants in return for \$1,300 per week and the opportunity to "make a lot of money."

Defendants answered the first amended complaint in May 2002. The next month they noticed a motion for summary judgment asserting Ryan's claims were barred by the statute of limitations. The trial court denied this motion. No issue is raised in this appeal as to the propriety of that ruling.

Before the trial court ruled on the motion for summary judgment, Defendants noticed a second motion for summary judgment or, alternatively, an order adjudicating the merit of the individual causes of action on the ground that there was "no triable issue of material fact as to the summary judgment or summary adjudication as a matter of law." This motion was also denied. We discuss the propriety of that ruling in part II of this opinion.

On November 18, 2002, Defendants gave notice to Ryan that they had paid his claim for back wages, unreimbursed expenses, a 1 percent bonus on a specific case plus interest, all totaling \$26,201.60 and all "relat[ing] to plaintiff's First Cause of Action for Breach of Oral Contract." This money was tendered with no conditions.

Trial commenced on February 10, 2003. On that date, Ryan dismissed the first cause of action (breach of oral contract), the sixth cause of action (misrepresentation in violation of Lab. Code, § 970), and the eleventh cause of action (misclassification of independent contractor status in violation of Unemp. Ins. Code, §§ 1112, subd. (a), 1113, 2118) as to the Defendants. After opening statements, the trial court granted nonsuit as to the Partners on the seventh cause of action for wrongful firing in violation of public policy. After presentation of plaintiff's case, the court granted nonsuit as to the Partners on the fourth cause of action (breach of oral contract and failure to pay bonuses). Ryan dismissed the second cause of action (quantum meruit).

Ultimately, the case was submitted to the jury on three causes of action: wrongful termination and breach of contract against the Law Firm, and fraud against the Defendants. A special verdict form was given to the jury. During deliberations, the jury asked, and the court answered, a question about the special verdict form. We discuss this issue in part III of this opinion.

The jury found the Law Firm liable for fraud and awarded Ryan damages in the sum of \$5,632. The judgment prepared pursuant to this verdict also awarded Ryan attorney fees and costs in an unspecified amount.

Ryan noticed a motion for an award of attorney fees pursuant to Labor Code section 218.5, in the sum of \$94,290 and costs in the sum of \$5,885.36. Defendants noticed a motion for an award of attorney fees to the Partners pursuant to Labor Code section 218.5 and to the Law Firm pursuant to Code of Civil Procedure section 2033, subdivision (o).

The trial court found Ryan to be a prevailing party within the meaning of Labor Code section 218.5, and awarded him attorney fees in the sum of \$94,290 and costs in the sum of \$4,981.46. The trial court also found the Partners to be prevailing parties and awarded them costs subject to proof that they, and not the Law Firm, paid the costs. Defendants contend the trial court erred in awarding Ryan attorney fees and denying their request for attorney fees. We discuss this contention in part IV of this opinion.

Defendants moved for judgment notwithstanding the verdict on several grounds. The trial court denied this motion. Defendants raise no issue concerning this ruling in this appeal.

Defendants also noticed a motion to amend or correct "clerical errors" in the judgment on the grounds that the award of attorney fees to Ryan was improper because he did not prevail on his claim for back wages and that the Partners were the prevailing parties. The trial court denied this motion. Defendants raise no issue concerning this ruling in this appeal.

## II

### THE TRIAL COURT PROPERLY DENIED DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION OF ISSUES

Defendants' motion for summary judgment or summary adjudication of issues asserted Ryan had denied requests for admission, which asked him to admit, among other things, that: none of the Defendants breached an oral contract; promised him he would share in the wealth of their partnership; requested him to advance costs on any of their cases; agreed he should advance costs or share in the losses on any of their cases; did

anything to breach their employment contract with him; did anything to defraud or deceive him; owed him any back wages; or caused him to suffer any damage. The motion further asserted that Ryan objected to and failed to answer an interrogatory, served simultaneously with the requests for admission, that sought the identity of facts, witnesses and documents supporting his denials. The motion argued that Ryan's responses demonstrated he could not prove his case, and therefore summary judgment should be granted to Defendants.

In opposing this motion, Ryan explained that he had been served in April 2002 with 63 requests for admission that were unaccompanied by any form interrogatories. Then, on May 15, 2002, he was served with a duplicate set of 63 requests for admission along with a form interrogatory asking him to state all facts, names and documents supporting any denials. Ryan responded to the first set of requests for admission on May 31, 2002. One month later he responded to the duplicate requests with the objection that they had been "asked and answered." Ryan argued that the motion for summary judgment or summary adjudication should be denied because his responses to these discovery requests did not satisfy the moving parties' burden to demonstrate that one or more elements of each cause of action could not be established or that there was a complete defense thereto.

The trial court denied the motion for summary judgment or summary adjudication of issues, ruling Defendants failed to meet their burden of showing Ryan would be unable to establish one or more elements of a cause of action or that there was a complete defense to a cause of action. The court explained: "No evidence or lack of evidence on

the Plaintiff's part has been shown by the Defendant [*sic*] to exist or not exist. Thus, the burden never shifted to the Plaintiff to prove a triable issue of fact as to any of the elements disputed by the Defendants." The trial court reasoned:

"The Defendants' entire motion is based upon an objection that was raised by the Plaintiff to a duplicate set of requests for admissions to which the Plaintiff had already responded, the second set of which was served with Form Interrogatory 17.1. The Plaintiff served an objection to responding to the duplicate set of requests for admission and the accompanying form interrogatory 17.1 on the grounds that Plaintiff had already been asked and he had already answered the requests for admission. The failure to respond to an identical set of request for admissions and an interrogatory related thereto based upon a timely filed objection cannot be used to prove the truth of the admission. If the Defendants believed that an objection to the interrogatory was improper, then they should have moved to compel further responses to the interrogatory pursuant to [Code of Civil Procedure section] 2030. Unlike in the case of *Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, which is cited by the Defendants in support of their motion, wherein the Plaintiff there actually responded with conclusory statements instead of facts supporting his position; here, there was no response to any interrogatory that shows an absence of facts to support the elements of Plaintiff's claims. Instead, in this case, there is an objection to the form of the interrogatory due to the fact that it was served attached to a set of requests for admissions that had already been asked and answered by the Plaintiff. Defendants never brought a motion to compel and/or attempted in any way to obtain this Court's decision as to whether the objection raised to the form of the interrogatory was improper. Further, the Defendants not only failed to present evidence that Plaintiff has no evidence to support an element to any one of the causes of action, but also that the Plaintiff cannot reasonably be expected to obtain such evidence. *Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 186."

Defendants do not contend the trial court's order denying their motion for summary adjudication of issues was in error as to 10 of the 11 causes of action. Instead, they contend that the order was an abuse of discretion only as to the cause of action for fraud. They argue, as they did in the trial court, that under the holding of *Union Bank v. Superior Court*, *supra*, 31 Cal.App.4th 573 (*Union Bank*), they adequately demonstrated

their entitlement to summary adjudication based on Ryan's factually devoid responses to their discovery requests. They claim there were not duplicate sets of requests for admission, as the trial court found, but rather two responses to one set of requests, the first being a denial and the second being an untimely and invalid objection.

"In reviewing an order on a summary judgment, the reviewing court employs the same process as the trial court in determining whether, as a matter of law, summary judgment was appropriate.' A court identifies the issues framed by the pleadings, determines whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in the moving party's favor, and if the summary judgment motion is meritorious on its face, the court will look to whether the opposition demonstrates there are triable, material factual issues. [Citation.] [Code of Civil Procedure] Section 437c, subdivision (c) allows the trial court ruling on the motion to consider all evidence and all the inferences reasonably deducible from the evidence set forth in the papers, 'except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.'" (*Clark v. Baxter Healthcare Corp.* (2000) 83 Cal.App.4th 1048, 1054.)

Applying this standard, we agree with the trial court that Defendants twice propounded the same set of requests for admission to Ryan. Accordingly, his objections to the duplicate set were not, as Defendants argue, untimely.

Turning to the merits, we determine *Union Bank, supra*, 31 Cal.App.4th 573, does not support Defendants' position. In *Union Bank*, the defendant proffered admission

requests and concurrently served an interrogatory asking for the facts on which denials were based. Plaintiffs denied that Union Bank did not defraud them or conspire to defraud them, and responded to the correlating interrogatories with the statement that they *believed* Union Bank had committed particular acts of fraud. They reserved the right to further respond to the interrogatories. Union Bank moved for summary judgment, asserting that the plaintiffs' factually devoid interrogatory answers were sufficient to shift the burden to the plaintiffs to prove that a triable issue of fact existed.<sup>1</sup> The trial court denied the motion for summary judgment, but the reviewing court reversed, holding that a defendant could secure a summary judgment "premised upon a plaintiff's factually devoid interrogatory answers." (*Id.* at p. 576.) The appellate court reasoned that factually inadequate discovery answers were sufficient to shift the burden to the plaintiffs to set forth specific facts proving the existence of a triable issue of material fact. The court held that since the plaintiffs provided no such facts in opposition to the motion, the defendant was entitled to judgment. (*Id.* at pp. 593-594.)

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<sup>1</sup> The burden-shifting provision of Code of Civil Procedure section 437c is now found in subdivision (p)(2), which provides: "A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff or cross-complainant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto."

*Union Bank* sparked a controversy as to the meaning of "factually devoid" in the procedural setting of a motion for summary judgment. (*Scheiding v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 81; *Krantz v. BT Visual Images* (2001) 89 Cal.App.4th 164, 172.) But even the court that decided *Union Bank* would not stretch its holding to cover the situation presented in the case before us. It made that clear in *Gaggero v. Yura* (2003) 108 Cal.App.4th 884, in which the plaintiff objected to deposition questions about his financial condition on privacy grounds, and the defendant attempted to use the objection to support its motion for summary judgment. The *Gaggero* court explained:

"This case differs significantly from *Union Bank*. When the plaintiffs in *Union Bank* stated mere *beliefs* in response to a question requesting *all facts* supporting an element of their claims, the logical inference was that after discovery they possessed no facts to support that element. [Citation.] Here, however, no such logical inference of an absence of facts can be drawn from an objection on privacy grounds — even though it was not a proper objection. All we may deduce is that plaintiff erroneously believed that the information sought was protected by his right to privacy — not that he either possessed or did not possess such information. For summary judgment purposes, a deposition objection and instruction not to answer are not the equivalent of a factually devoid response, and therefore cannot be used to shift the burden from the moving defendant to the plaintiff under Code of Civil Procedure section 437c, subdivision (p)(2)." (*Gaggero*, at p. 892.)

The case before us falls squarely within the *Gaggero* distinction. Ryan's objection that he previously had been asked and had answered the duplicate set of requests for admission was, in effect, an assertion that the discovery was burdensome and oppressive. This response did not support an inference that he lacked facts to support his claims. Therefore, the burden did not shift to Ryan to set forth facts in opposition to Defendants'

motion for summary adjudication. Defendants do not suggest that their motion was otherwise sufficient under Code of Civil Procedure section 437c, subdivision (p)(2) to shift the burden to Ryan. Accordingly, we conclude the trial court properly denied Defendants' motion for summary adjudication as to the cause of action for fraud.

### III

#### THE TRIAL COURT'S RESPONSE TO A QUESTION ASKED BY THE JURY DID NOT CONSTITUTE A DIRECTED VERDICT, NOR WAS IT THE CAUSE OF ANY INCONSISTENCY IN THE VERDICT

As we have previously recounted in part I of this opinion, Ryan submitted this case to the jury on only three causes of action: wrongful termination in violation of public policy against the Law Firm, breach of contract to pay a 10 percent contingency fee on a particular case against the Law Firm, and fraud against the Defendants. The special verdict form provided to the jury questioned whether each of the Defendants was liable on each of these three theories. Although the court instructed the jury that California law provided for a penalty in an amount equal to 30 days' wages where an employer willfully failed to immediately pay the wages of an employee who was discharged,<sup>2</sup> and Ryan's counsel argued to the jury that in this case that sum was \$5,632,

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<sup>2</sup> The court stated: "It is a fundamental public policy of the State of California for an employer to promptly pay wages on demand and prohibits deductions without an employee's consent. [¶] . . . [¶] If an employer willfully fails to pay any wages of an employee who is discharged, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or an action is commenced, but such wages shall not continue for more than 30 days."

This instruction was based on Labor Code section 203, which provides in relevant part: "If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.5, 202, and 205.5, any wages of an employee who is

the verdict form did not mention that theory, nor did it provide a line on which to make such an award.<sup>3</sup>

During deliberations, the jury asked: "If we believe Ryan was not wrongfully terminated, how do we give him the 30-day salary that we believe California law stipulates is owed if an employee is laid off and not paid all wages, back costs at the time of [discharge]?"

When this question was discussed among counsel and the court, defense counsel asked where the jury should put such an award on the verdict form. The court suggested the jury could make the award as damages for fraud on the theory that Defendants made a false promise. Defense counsel argued it was for the court, not the jury, to make the award. The court replied, "Why didn't you tell me that when we instructed them? We told them they could do that." The court offered to take the issue from the jury if defense counsel would stipulate "that the court could award the 30 day salary to plaintiff regardless of what the jury does." Defense counsel agreed, but Ryan's counsel objected, asserting that the jury's question must be answered.

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discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days."

<sup>3</sup> It appears from the clerk's transcript that Defendants proffered a special verdict form different from the one provided to the jury. That form also did not contain a place for the jury to award the Labor Code section 203 penalty. The reporter's transcript does not reflect any discussion of, or objection to, the special verdict form used in this case.

The court replied to the question as follows: "If you do not find liability on the wrongful termination cause of action then you cannot award 30 days salary on that cause of action. That damage award is available if you find plaintiff has established elements of the fraud cause of action."

Defendants contend the trial court's response to the jury's question amounted to an improper directed verdict which, in turn, led to an inconsistent and ambiguous verdict. They claim that the jury found no fraud and was prepared to award no damages on that cause of action. Defendants conclude the jury had no choice, if they wanted to make the award, but to find fraud. They argue that what the court should have done was tell the jury it could not make any award for the statutory penalty.

Defendants' assertion that the jury found no fraud and was prepared to award no damages on that cause of action is not supported by the record. It appears Defendants come to this conclusion by inferring from the amount of the fraud award that the jury in effect awarded the penalty allowed by Labor Code section 203. While the inference about *how* the jury calculated the amount of "fraud" damages is not unreasonable, we cannot ignore the fact that the court instructed the jury it could make this award only *if* it found the elements of fraud had been proved. Therefore, the court's reply to the jury's question clearly was *not* a directed verdict because the court did not direct the jury to find for either party. (Cf. *Southern Cal. Tel. Co. v. Carpenter* (1946) 75 Cal.App.2d 336, 343 [the trial court may direct a verdict against a party when there is no evidence of sufficient substantiality to support a verdict in favor of such party, if such a verdict were rendered].)

Defendants also argue that the verdict contained an inherent inconsistency because the jury found only the Law Firm, and not the Partners, liable for fraud.<sup>4</sup> They cite *Nicholls v. Anders* (1936) 13 Cal.App.2d 440 in support of the proposition that a partnership cannot be liable for fraud unless the partners are liable. That case is procedurally distinguishable from the case before us. There, the plaintiff's attorney quietly took a default judgment against the partnership and then went to trial against the partners. The reviewing court held that "no default judgment can be secured effectively against the partnership until trial has been had upon the issues raised by the answer of both partners." (*Id.* at p. 443.) The reviewing court also held the plaintiff waived the default and the judgment by going to trial on the merits against the partners. (*Id.* at p. 445.)

In this case, by contrast, both the Law Firm and the Partners were before the court on the fraud cause of action, and the Partners concede they were individually liable for back wages owed to Ryan. The jury was never asked to distinguish between the Partners and the Law Firm on this claim, nor were they instructed on the vicarious liability of the Law Firm for the acts of the Partners or vice versa.<sup>5</sup> This issue was not raised in the trial

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<sup>4</sup> At another point in their opening brief, Defendants assert that the Partners were "successfully dismissed during trial." If this were true, it would undermine Defendants' arguments concerning the alleged inconsistency in the verdict form. But it is not true. Ryan prosecuted the fraud cause of action against all three defendants.

<sup>5</sup> Defendants raise no issue in this appeal concerning this lack of instruction. Indeed, they may not, absent a request for such an instruction in the trial court. (*Linzsey v. Delgado* (1966) 246 Cal.App.2d 504, 509.)

court. Thus, Defendants' attempt to slip this issue in under the cloak of its objection to the trial court's response to the jury's question fails. The court simply did not mention the issue of the liability of the partnership as opposed to the individual partners. It necessarily follows that any confusion or inconsistency in the verdict results from the lack of any instruction on the issue, not from the court's reply to the jury's question.

In any event, we have not been provided with a reporter's transcript of the taking of the verdict, and for this reason do not know whether Defendants objected to the verdict on the ground of inconsistency *when it was rendered*, as they should have done if they wished to preserve this issue for appeal. (See Code of Civ. Proc., §619; *Mendoza v. Club Car, Inc.* (2000) 81 Cal.App.4th 287, 301.) It is reasonable to infer they did not, since they now argue they did not waive the issue on appeal under the holding of *Remy v. Exley Product Express, Inc.* (1957) 148 Cal.App.2d 550. That case, however, is distinguishable. In *Remy*, the jury held one defendant negligent as to plaintiff but not negligent as to another party, an impossibility under the facts of the case. Therefore, the jury's verdict was inherently inconsistent. The reviewing court concluded the issue was not waived for failure to call it to the trial court's attention because the verdict was so defective as to be insufficient. (*Id.* at p. 555.) Here, by contrast, the verdict was not inconsistent on its face since a partnership is liable for the injuries resulting from the willful misconduct of a partner while engaged in the business of the partnership. (*Madsen v. Cawthorne* (1938) 30 Cal.App.2d 124, 125-126.) Therefore, a request for clarification would most likely have resulted in the explanation that the jury found the fraud committed by agents of the partnership for the benefit of the partnership. It

necessarily follows that there was no fatal inconsistency in the verdict that could not have been corrected if it had been brought to the trial court's attention. Accordingly, Defendants have waived the issue on appeal. (*Silverhart v. Mount Zion Hospital* (1971) 20 Cal.App.3d 1022, 1029.)

Defendants attempt to avoid this conclusion by characterizing their objection to the court's response to the jury's question as having been made on the ground that a finding of fraud would be "inconsistent with the jury's finding of no liability." This argument distorts the record. When the jury asked its question, it indicated only the hypothetical possibility that it might not find liability on one of the three theories it was asked to decide, i.e., wrongful termination. At that point the jury had *not* found, as Defendants assert in this appeal, that there was "no wrongful termination or breach of oral contract." And it had *not* found, as Defendants assert, "no fraud." When the jury asked the question there was no basis upon which to conclude that it would not find liability for fraud or breach of contract. Therefore, contrary to the assertion of Defendants, their counsel's objection was not "obviously" made on the ground of a possible inconsistency. Defendants' attempt to avoid their waiver fails.

#### IV

#### COSTS AND ATTORNEY'S FEES

##### A. *The Findings and Awards Under Labor Code Section 218.5*

The Partners, but not the Law Firm, requested attorney's fees and costs under Labor Code section 218.5. So did Ryan. Ryan was awarded both attorney's fees and

costs, while the Partners were awarded only costs, contingent upon proof that they paid the costs individually.

Labor Code section 218.5 provides in relevant part: "In any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions, the court shall award reasonable attorney's fees and costs to the prevailing party if any party to the action requests attorney's fees and costs upon the initiation of the action." The interpretation of this statute and its application to the circumstances of a given case presents a question of law, subject to independent review on appeal.

(*Californians for Population Stabilization v. Hewlett-Packard Co.* (1997) 58 Cal.App.4th 273, 294; *Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1426.)

Defendants argue that Ryan was not entitled to any recovery under Labor Code section 218.5 because the only cause of action on which he was awarded damages by the jury was fraud, which they argue is not an action for nonpayment of wages. This argument contradicts the position Defendants have previously asserted in this appeal, i.e., that the award was really *not* for fraud, but was actually a penalty under the Labor Code. Apparently realizing this contradiction, Defendants argue in their reply brief that a penalty under Labor Code section 203 is not wages for the purposes of Labor Code section 218.5. Defendants support this assertion with a cite to *Oppenheimer v. Sunkist Growers* (1957) 153 Cal.App.2d Supp. 897, but that case does not assist them. In *Oppenheimer* the issue was whether an employee was entitled to a penalty for a full 30 days even though the employer paid all wages due to him less than 30 days after the

employee quit. There was no discussion in *Oppenheimer* of the issue presented in this case.

In any event Defendants' argument flounders because it attempts to focus on a particular cause of action rather than the nature of the action as a whole. There can be no question but that Ryan sued Defendants to recover back wages, framing his complaint on many theories, including fraud. One of the false promises alleged was the false representation "that [Ryan] would be repaid the monies he advanced, as well as his back wages and expenses." Nor can there be any question but that Ryan prevailed in his action for back wages. The evidence proved payment to Ryan by the Law Firm, during the pendency of this action, in the sum of \$26,201.60 "for wages, expenses, and his bonus on [the] Morales [case]" plus interest. Under these circumstances, the trial court did not err in finding Ryan prevailed against the Law Firm within the meaning of Labor Code section 218.5.

The Partners also contend that they were the *only* prevailing parties within the meaning of Labor Code section 218.5. Their sole theory is that the jury did not find them liable for back wages on any theory, more particularly the eighth cause of action for back wages. As Defendants are well aware, Ryan did not prosecute the eighth cause of action to verdict, and the special verdict form mentioned neither the eighth cause of action nor back wages. This may have been because Defendants paid Ryan more than \$26,000 in back wages, costs and interest before trial. Despite this payment and their inherent

admission of liability,<sup>6</sup> the trial court found the Partners to be prevailing parties and awarded them costs. Under these circumstances we find no error in the court's conclusion that Ryan was also a prevailing party.

B. *The Court's Denial of Defendants' Request for Expenses of Proof Under Code of Civil Procedure Section 2033, subdivision (o)*

All Defendants moved for an award of attorney's fees under Code of Civil Procedure section 2033, subdivision (o), on the ground that Ryan unreasonably denied requests for admission of fact. Ryan opposed the request, but did not mention his denials of requests for admission. The trial court denied Defendants' request for expenses without explanation.

Code of Civil Procedure section 2033, subdivision (o) provides: "If a party fails to admit . . . the truth of any matter when requested to do so under this section, and if the party requesting that admission thereafter proves the . . . truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make this order unless it finds that (1) an objection to the request was sustained or a response to it was waived under subdivision (l), (2) the admission sought was of no substantial importance, (3) the party

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<sup>6</sup> The November 7, 2002 cover letter from defense counsel sent with the payment stated in part: "Last Wednesday or Thursday we spoke by telephone, and among other things, I told you that I would be sending you this week the amount of money Ronquillo and Orderica owed Mr. Ryan for wages, expenses, and his bonus on Morales. . . . [¶] This money is being tendered with no conditions. The reason it was not paid initially was because of the death of Mr. Orderica's son back in early 2000."

failing to make the admission had reasonable ground to believe that that party would prevail on the matter, or (4) there was other good reason for the failure to admit."

Defendants bear the burden of proving the trial court abused its discretion in denying their request, thereby resulting in an injustice. (*Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 637, fn. 10.) In an attempt to satisfy this burden, Law Firm argues that: the jury's verdict demonstrates Ryan's denials were unreasonable; Ryan offered no excuse for his denials; and Ryan was "shown to be a liar in front of the jury" on the issue of whether he attempted suicide. They assert that they prevailed "on all theories," i.e., on all 11 causes of action alleged against them. The judgment does not support Defendants' broad assertion. But even if it did, they cite no case, and our research has revealed none, holding that a bare defense verdict justifies an award of discovery sanctions against a plaintiff pursuant to Code of Civil Procedure section 2033, subdivision (o). Accordingly, we conclude Defendants have not met their burden of showing the trial court abused its discretion in denying their request for attorney's fees.

## DISPOSITION

For the foregoing reasons the judgment is affirmed. Ryan is awarded his costs on appeal.

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IRION, J.

WE CONCUR:

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BENKE, Acting P. J.

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O'ROURKE, J.